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Supreme Court, U.S
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No. 07-

IN THE

Supreme Court of the United States

KANDAYCE WHITEHEAD, individually and as administratrix of the Estate of her Husband, William Lester Whitehead,

Petitioner,

v.

ABB LUMMUS GLOBAL BV,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented is whether the United States District Court, Middle District of Louisiana, properly granted a Rule 12(b)(2) Motion to Dismiss plaintiffs' action based on lack of personal jurisdiction over the defendant, ABB Lummus Global, BV and whether the U.S. Fifth Circuit properly affirmed said ruling.

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Petitioners respectfully petition for a writ of certiorari to review the Judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The District Court's opinion granting defendant's Rule 12(b)(2) Motion to Dismiss judgment motion is not published (App. B). The Court of Appeals' opinion affirming is not published (App. A).

STATEMENT OF JURISDICTION

The Court of Appeals for the Fifth Circuit entered its opinion and order on July 24, 2007. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The provisions of Rule 12(b)(2), Federal Rules Civil Procedure regarding motions to dismiss.

STATEMENT OF THE CASE

A. Course Of Proceedings And Disposition Of The Court Below.

On April 26, 2004, Kandace Whitehead individually and as Administratrix of the estate of William L. Whitehead filed a Complaint with the U.S. District Court, Middle District of Louisiana, against various Petrofac and ABB Lummus Global defendants (USCA5 ROA 11-15). Through discovery the ABB entities revealed that the specific ABB entity involved in the

Ohanet Project was ABB Lummus Global BV and plaintiff subsequently amended her Complaint to assert claims against said entity.

All of the Petrofac entities were served both in the United States and London and responded and submitted to the jurisdiction of the Middle District Court of Louisiana asserting a Motion to Dismiss based on the employer/employee relationship based on the Louisiana Workers' Compensation statutory scheme.

The remaining allegations in this litigation were directed toward the joint venturers in the Ohanet Project, ABB Lummus Global BV for the role it played in its failure to maintain a safe working environment for Mr. Whitehead.

ABB Lummus Global BV filed a Rule 12 (b) (2) Motion with the Middle District Court to Dismiss the action based on lack of personal jurisdiction and plaintiff-appellant opposed said motion. The Motion was orally argued before Honorable James J. Brady on September 19, 2006. After considering the argument of counsel and evidence submitted, Judge Brady issued written reasons in his ruling on September 21, 2006 granting the dismissal of plaintiff-appellant's case. (USCA ROA 578-582). An Order dismissing petitioner was signed by Judge Brady on September 25, 2006 (USCA5 ROA 583). Said Order was appealed to the United States Fifth Circuit Court of Appeals and affirmed on July 24, 2007 (*See* Appendix A).

B. Statement Of Facts

On December 19, 2002, William Whitehead was hired by Petrofac International Ltd. as a commissioned operator assigned to the Ohanet Project in Algeria. Mr. Whitehead was a resident of Louisiana and flew to Texas to meet with a representative of ABB Lummus Global, Inc. to pick up his flight itinerary and lodging information for his work assignment in Algeria. ABB Lummus Global, BV had jointly ventured with Petrofac International Ltd. (Mr. Whitehead's employer) in the Ohanet Field Project in Algeria.

On May 4, 2003, Mr. Whitehead while on the job was required to travelapproximately 90 miles into the desert where he stopped his truck and collapsed in the back ultimately dying from heat stroke with severe acute lung and brain congestion, which if properly and more timely treated, would have prevented his death.

The allegations against ABB Lummus Global BV was that it failed to provide for the safety of workers on the project, it failed to provide working radios for communication and emergency purposes, which would have prevented this tragedy from occurring.

REASONS FOR GRANTING THE PETITION

The petition should be granted because the United States Court of Appeals for the Fifth Circuit has decided an important question of federal law that has not been, but should be, settled by this Honorable Court.

ARGUMENT

As a **joint venturer** with Petrofac International LTD, ABB Lummus Global BV is subject to jurisdiction of the Middle District Court of Louisiana for the United States District Court as a result of Petrofac International Ltd. waiver of same by responding to the complaint asserting Louisiana law as applicable and obtaining judgment in its favor from the Middle District Court of Louisiana.

Mrs. Whitehead agrees that personal jurisdiction is an essential element of the jurisdiction of the district court without which it is powerless to proceed to adjudication. *Ruhrgas AG v. Marathon Oil Company*, 526 U.S. 574, 119 S. Ct. 1563, 143 L. Ed. 2d 760 (1999). A court must find jurisdiction both subject matter and personal before determining the validity of the claim. *Moran v. Kingdom of Saudia Arabia*, 27 F.3d 169 (5th Cir. 1994).

At the outset, the inquiry should begin and end with the fact that ABB Lummus Global BV's partner in this joint venture not only consented to the jurisdiction of the Middle District but additionally availed itself of the laws of this State in applying the laws of Louisiana to exonerate itself under the Louisiana Workers' Compensation statutory scheme.

As a general rule parties to a joint venture are mutually and vicariously liable for injuries or harms caused by their venture. Resembling the law of partnership, all the members of a joint venture may be liable jointly and severally for a tort committed by one of them in conducting the business of a joint venture.

Stecyk, et al. v. Bell Helicopter Textron, Inc., et al., 1998 U.S. Dist. Lexis 17668 No. 94-CV-1818 (E.D. Pa. November 9, 1998) Therefore, it follows that if one of the "parties" to the joint venture elects to submit to the jurisdiction of the court, the jurisdiction over its co-venturers should be established through consent.

This may certainly prompt the ABB Lummus Global BV to respond that if that were the case then Whitehead could be considered an employee of ABB Lummus Global BV in addition to his employment status with Petrofac International Ltd.; however, while that is not the issue before this Court, as a practical matter, the deposition testimony of the corporate representative of Petrofac International Ltd. and ABB Lummus Global BV clearly outline a delineation between the individual venturers' (ABB and Petrofac) control over the specific operations on this project.

In the corporate deposition of Petrofac, Brian Dinsmore, the corporate representative, stated that the ABB scope within the joint venture was "ISBL" (inside the battery limits) whereas the Petrofac entity had the scope for the OSBL, which is outside the battery limit work. The critical part of the joint venture, however, was that *both Petrofac and ABB played a joint and active role in the safety of the workers* and Mr. Dinsmore candidly stated as follows (USCA5 ROA 346):

> Q. But as far the safety went, they would all meet together apparently regularly and go over general safety for all of them jointly if you will.

> A. Yes it was a way, you know of being proactive in that sense in gathering the companies together and explaining in terms of safety, you know, what our objectives were in terms of HSE (health safety and environment)" (Exhibit 6 to the deposition)

Later in his deposition, he stated:

> A. . . . I guess the form of the question would be ABB site safety responsibility was I guess the joint venture, the personnel at site, let's say they came from different sources, they would come from Petrofac, they would come from ABB, the HSE responsibility on site was part of the joint venture, and BHP also.

(USCA5 ROA 391).

This case is about the failure to provide a safe workplace including Mr. Whitehead's lack of a radio at the time of the heat stroke.

The exhibits attached to the corporate deposition of Brian Dinsmore, the Petrofac representative, show radio logs and verify that some people did not have radios. When questioned as to the safety practices involved in providing radios to workers, Mr. Dinsmore offered the following:

> Q. That would be a safe practice to make sure that you had functional radios in the vehicles when you went out there.

> A. Safe and practical as well. Because people do want to talk to one another. Even on the plant people would carry radios so they could communicate, where are you, get back to such and such a place, can I meet you there, can we do such and such, this was a means of communication ...

(USCA5 ROA 360).

It is respectfully submitted that as a joint-venturer to this project, the various Petrofac entities, including Petrofac International Ltd., who was Mr. Whitehead's employer, and a party to the joint venture agreement, all consented to the jurisdiction of the U.S. Middle District Court of Louisiana and further, have now had the U.S. Middle District Court of Louisiana Court apply Louisiana law to this case. As a result, your appellant submits that as a partner to the joint venture, ABB Lummus Global BV is now subject to the jurisdiction of the U.S. Middle District Court of Louisiana.

Although the merits of this case are not at issue herein, it should be noted that ABB Lummus Global BV had *equal* participation in providing safety to the workers on this project; however, it did not have the necessary control over Mr. Whitehead's work duties that would rise to the level of employment. As further evidence of their responsibility for safety, both jointly participated in the preparation of the incident report. (USCA5 ROA 453). In any event, the question of ABB's negligence is for a jury to decide.

Additionally, under Louisiana statutory scheme, which has already been applied as the law in this case, there is nothing in the contractual agreement which is

attached as an exhibit to the deposition of Mr. Dinsmore to indicate that Mr. Whitehead should be treated as an employee of ABB Lummus Global, BV.

Ergo, Mr. Whitehead's widow should be allowed to proceed in this case based upon the alleged negligence of ABB Lummus Global BV in failing to provide a safe environment, effective communication and a safe workplace as alleged in the complaint.

While petitioner submits that the jurisdictional inquiry should end there and Mrs. Whitehead be allowed to proceed to trial on the merits, she will address the arguments as to whether or not the additional contacts are present in this case to assert jurisdiction over ABB Lummus Global BV.

As this Court is well aware, in determining whether personal jurisdiction exists over the defendant, ABB Lummus Global, BV, the Court must first examine the defendant's contacts with the forums in order to find that minimum contacts exist with the forum or in order to find that minimum contacts exist by way of specific or general jurisdiction. If minimum contacts exist, the Court must then determine if it will be fair to exercise jurisdiction over the defendant.

A. Specific Jurisdiction

Specific jurisdiction exists when the non-resident contacts with the forum arise from or are directly related to the cause of action. *Wilson v. Belin*, 20 F.3d 644 (5th Cir. 1994). In its argument, ABB Lummus Global, BV simply made a blanket allegation that the contacts

of ABB were not directly related to the plaintiff's incident which occurred in Algeria. Mrs. Whitehead, petitioner, respectfully disagrees. According to the Complaint, the ABB Lummus Global representative met with and provided flight information and tickets to Mr. Whitehead in the United States. This was in an effort to bring Mr. Whitehead over to participate in the Ohanet Project in Algeria.

This case is about workplace safety of a U.S. Citizen recruited from the United States to work in Algeria on this joint venture project. Additionally, the suit is against ABB for failure to provide necessary equipment by way of radios and a safe working environment and work place. It therefore necessarily "arises out of and relates to" the workplace where Mr. Whitehead was brought following his contacts with ABB Lummus Global BV representative in Texas. Therefore it is submitted that specific jurisdiction in this case does exist. *Coates v. Penrod Drilling Corp.*, 5 F.3d 877 (5th Cir. 1993).

B. General Jurisdiction

Defendant-appellee, ABB Lummus Global BV relied almost exclusively on the *Helicopteros Nacionale de Columbia, SA v. Hall* (1984) 466 U.S. 408, 80 L. Ed. 2d 404, 104 S. Ct. 1868 in support of its argument that no general jurisdiction exists in this case; however, the facts are clearly distinguishable there. In that case, Helicol was not a joint venturer with Consorcio/WSH which was headquartered in Houston, Texas. While there was a contract between Helicol and the joint venture, it was for a specific purpose of providing helicopter transportation for oil and construction companies in

South America. This differs greatly from the joint venture at hand. Helicol did not have any "presence" in the United States by way of corporate offices, subsidiaries or affiliates. ABB Lummus does and is actually part of the joint venture. Attached to the deposition of the corporate representative, Obbe Siderius, located at USCA5 ROA 482-569, are the flow charts (USCA ROA 559) of the affiliates and corporations world wide.

At the outset, it is clear from the testimony of Brian Dinsmore and discovery that ABB Lummus Global BV had US citizens in its employ at the time of this incident. Joe Moss is believed to have gotten on the project through ABB and he is believed to be a U.S. citizen (USCA5 ROA 351-352). Mr. Dinsmore went on to testify that he believed that somewhere between six to ten employees were U.S. citizens (USCA5 ROA 340).

Additionally the deposition testimony of ABB's corporate representative, Obbe Siderius, is that ABB Lummus Global Inc. in Houston, Texas is affiliated with ABB Lummus Global BV. (USCA5 ROA 496). He further went on to testify that ABB Lummus entities maintain offices in the United States in New Jersey and Houston. (USCA5 ROA 497). He further went on to testify that there are employees which are U.S. citizens based in each of those operations. (USCA5 ROA 497-498).

Most importantly the relationship between the ABB Lummus entities in the United States and those abroad allow for sharing and/or "loaning" of employees as the need arises. Significantly, the affiliated companies and offices in the United States are essentially engaged in the same type of business as ABB Lummus Global BV (USCA5 ROA 497).

In response to questioning he stated as follows:

> Q. Do you know whether or not any of those employees have at any point in time worked for them, have transferred out of that ABB entity into any of these other ABB entities for maybe a single project purposes or other purposes?
>
> A. That would have been done on a loan basis, a kind of secondment,
>
> Q. A loan base?
>
> A. Yes.
>
> Q. If ABB was in a situation where they needed to pull somebody from any of these other entities or structures on a loan type basis that would be something that is acceptable within the group?
>
> A. Yes.

(USCA5 ROA 498).

Additionally, he acknowledged that ABB has a website which can be accessed worldwide. He acknowledged that you can search for a job and go through legal entities of any other countries which have a centralized database for people looking for jobs or employees for job availability. (USCA5 ROA 498-499).

Also, the conglomerate for ABB Lummus Global entities were originally started in 1904 by Walter E. Lummus, a U.S. Citizen, who formed a U.S. company. Ultimately a merger took place and Lummus became ABB Lummus Crest. (USCA5 ROA 502).

As for a comparison of ABB Lummus Global, Inc. in the United States and ABB Lummus Global BV, Mr. Siderius acknowledged that Mr. Gross is the president and CEO of ABB Lummus Global, Inc. and a director of ABB Lummus Global BV. Further, he acknowledged that there are seven directors on ABB Lummus Global, Inc. that are U.S. citizens and could potentially be members of other boards of the ABB group.

Further, there are annual reports issued on the website that take into consideration all of the companies of the group (USCA5 ROA 518). There are also "alerts" that are regularly posted on the website to keep the public informed as to new developments within the ABB Group. (USCA5 ROA 520). Significantly, all of the information that travels through one public relations office for the entire group (USCA5 ROA 520-521). He goes on to state that with respect to recruitment that they would utilize the services of ABB Lummus Global Inc. in the United States to make hires of U.S. employees to work for ABB, BV or other ABB entities overseas which appears to have occurred in this case (USCA5 ROA 522).

As this Court is well aware, under certain circumstances a sufficient and close relationship between a parent and subsidiary may subject one corporation to personal jurisdiction based in part on some of the

contacts of the other. *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154 (5th Cir. 1983). In this case, there is clear evidence of the mutual opportunities for control, exercise between the various ABB Lummus entities including ABB Lummus Global, BV and ABB Lummus Global, Inc.

It is clear that ABB Lummus Global BV has sufficient minimum contacts outside of the joint venture aspect of this case to assert jurisdiction over it. ABB has a single unified website for all of its companies. It utilizes both the U.S. base corporation as well as the London entity for hiring of employees or contract hires for various projects. The President and CEO of ABB Lummus Global, Inc., Mr. Gross, is also on the Board of Directors of ABB Lummus Global, BV. The ABB Lummus Group clearly utilized its contacts with the United States in order to facilitate Mr. Whitehead's arrival in Algeria as an employee of Petrofac, Inc. There is a presence of ABB Lummus in the U.S. and there is an agreement amongst each other to loan and share employees as necessary as well as a single website devoted to the entire ABB Group in which recruitment is done both inside and outside the U.S. for work outside the U.S. It is also noteworthy that none of these entities are publicly traded companies. The stock is owned among each company therefore tying the entire ABB Group together. This unified network allows part of the group such as ABB Lummus Global BV to benefit from the contacts in each respective forum, such as the ABB contacts in the United States.

Many of these factors have been referred to by this Honorable Court to be utilized in determining whether or not minimum contacts exist for purposes of jurisdiction including stock sharing, common officers and directors, accounting practices and authority.

It is clear that the closeness of the relationships of the ABB Lummus Global Group, specifically ABB Lummus Global, BV and ABB Lummus Global, Inc. warrants the exercise of jurisdiction over ABB Lummus Global BV by the United States District Court for the Middle District of Louisiana.

C. Exercise Of Jurisdiction Over ABB Lummus Global BV Does Not Offend Traditional Notions Of Fair Play And Substantial Justice

Petitioner, Mrs. Whitehead, submits that exercise of jurisdiction in this case does not offend traditional notions for fair play and substantial justice. At the outset, a majority of the discovery requiring currently employed individuals of the defendant has already taken place by virtue of counsel for appellant traveling to The Netherlands and taking the 30(b)(6) depositions of both corporate representatives, ABB Lummus Global BV and Petrofac International, Ltd.

The deposition testimony clearly indicates that the majority of those who would potentially be witnesses to the facts of Mr. Whitehead's tragedy are no longer within the control of either Petrofac International Ltd. or ABB Lummus Global, BV, thus the burden will be on appellant to locate said individuals and determine the necessity of their participation in the litigation as well as justification in expense in locating various witnesses and proceeding to take their depositions. This creates no undue burden on the defendants.

As the Court is well aware, "once minimum contacts are established, a defendant must present a compelling case that the presence of some consideration would render jurisdiction unreasonable." *Burger King* v. *Rudzewicz*, 471 U.S. at 477, 105 S. Ct. at 2184.

The U.S. District Court for the Southern District of Texas in *Enviro Petroleum Inc. v. Kondur Petroleum S.A. et al.*, 79 F. Supp. 2d 720 (So. D. Tx. 1999) elaborated the Burger King Court's reasoning in an alter ego case :

> "No doubt Setdco and Kondur will experience some slight inconvenience by being forced to litigate this matter in a Texas forum. *But in light of the fact that Defendants are highly sophisticated international business concerns with multi million dollar projects throughout the world, it is hard for this Court to find too burdensome to defendants to answer in a Texas forum for the alleged breach of a Texas contract that they actively solicited from a Texas corporation*" See *Burger King* 471 @ 474 105 S.Ct 2183 ("because modern transportation and communications have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity, it usually would not be unfair to subject him to the burdens of litigating in another forum for disputes relating to such activity.") ... **(Emphasis Added)**

In this case ABB Lummus Global BV is an integral member of the entire ABB group with operations throughout the world including affiliated offices and places of business in the United States. It is submitted that ABB's ties with the United States provides them with corporate offices here. Additionally, of the witnesses thus far identified, it does not appear that ABB Lummus has any working relationship with those individuals, and in fact for most, do not know their current location much less accept responsibility for same. As a result, any additional pertinent factual information that may be necessary is no less difficult for your respondent or ABB Lummus Global BV to obtain or access whether this case is in Algeria or the United States.

Given the fact that plaintiff initiated the discovery that has taken place thus far overseas, the defendant, a multi-million dollar world wide corporation with business locations and several offices, overlapping directors and loanable employees does not present "a compelling case that there is the presence of some consideration that would render jurisdiction unreasonable." *Burger King* 471 U.S. at 477 105 S. Ct. at 2184.

Finally, defendant, ABB Lummus Global BV, asserts that somehow the burden, if any, on these independent witnesses over which they have no control, somehow enures to their benefit and translates into a lack of "fair play" and a substantial injustice to them. This is not part of the equation. The only inquiry is whether it offends the notions of fair play and substantial justice for ABB Lummus Global BV to litigate this case in the United States of America. It does not.

CONCLUSION

ABB Lummus Global BV entered into a joint venture agreement with Petrofac International Ltd. who submitted itself to the jurisdiction of the United States District Court for the Middle District of Louisiana by virtue of the pleadings contained herein, and in fact, utilized a Louisiana statutory scheme to obtain dismissal of all Petrofac entities. By virtue of the joint venture agreement ABB Lummus Global BV likewise is subject to jurisdiction at the Middle District Court of Louisiana.

Further, William Whitehead's injury resulted while working for the benefit of the parties to the joint venture agreement for which purpose he was hired by Petrofac International Ltd. and assisted by ABB Lummus U.S. to make his way to the Ohanet Project in Algeria. It is submitted this rises to the level of specific jurisdiction arising out of ABB Lummus Global BV contacts with the United States.

There is sufficient minimum contacts outside the confines of specific jurisdiction and the joint venture relationship that show ABB Lummus Groups contacts with the United States, specifically, ABB Lummus Global BV and ABB Lummus Global, Inc. (The United States based entity) have overlapping officers, website information, recruiting tactics, loanable employees from entity to entity, a universal website accessed only by acronym "ABB", and accounting reports across the board.

These along with the other aforementioned issues clearly indicate that the ABB Group specifically

including ABB Lummus Global BV who had a number of U.S. employees working at the Ohanet project avails itself of the forum of the United States and as such is subject to jurisdiction here.

Finally with respect to whether or not the exercise of such jurisdiction offends the traditional notions of fair play and substantial justice, it clearly does not. ABB is world wide corporation that has offices in the United States, shares employees, and utilizes same to recruit overseas projects. They are clearly a sophisticated conglomerate that travel the world as part of its business operations and clearly the directors are from differing countries including the United States. Travel is certainly an integral part of ABB Lummus Global BV operations and realistically, there is no different burden on ABB Lummus Global BV to appear in Court in the Middle District of Louisiana than it is for a corporate representative from The Netherlands to travel to Algeria. In fact, most, if not all, the potential relevant witnesses are no longer within the care, custody or control of ABB Lummus and therefore, your respondent is more likely to have to initiate tracking systems to locate them so whatever inconveniences may arise from that aspect of this case should not enure to the benefit of this world wide conglomeration.

Therefore, it is respectfully submitted, that the Motion to Dismiss for Lack of Personal Jurisdiction was improperly granted and the affirmation of said ruling by the Fifth Circuit Court of Appeals should be overturned by this Honorable Court and further that William Whitehead's widow, Kandace Whitehead, be allowed to have her day in Court in the United States of America.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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